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IN THE

Supreme Court of the United States

October Term, 1967
No. 66

CASE-SWAYNE CO., INC.,
Petitioner,

vs.

SUNKIST GROWERS, INC.,
Respondent.

PETITION FOR REHEARING BY RESPONDENT SUNKIST GROWERS, INC.

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PETITION FOR REHEARING BY RESPONDENT SUNKIST GROWERS, INC.

Sunkist Growers, Inc. hereby petitions the Court for a rehearing of the above-entitled matter, the opinion in which was delivered on December 18, 1967, upon the following grounds and for the reasons hereinafter stated:

1. The Court has not correctly stated the facts in three important particulars.

2. Five key "findings of fact" made by this Court and material to the determination are not supported by the record herein.

3. The opinion confuses rather than clarifies the law of agricultural cooperatives in several important respects.

Summary of Sunkist's Position.

The Opinion of this Court delivered in this proceeding will have far reaching consequences for the thousands of Sunkist growers and for large numbers of agricultural cooperatives across the country. There is no question that it will limit the operation of cooperatives and discourage their development. It represents a major change of attitude and approach to cooperatives, advising farmers and growers that they must conform to the *form* as well as the *substance* of statutes relating to cooperatives.

The direct command of this decision to agricultural marketing associations is as follows: You must reach a specific result by a route which you must select at your peril, and after you have selected the route and made business commitments based upon it, we will then tell you whether the route is a correct one or not.

Such a major innovation should be based only upon a complete record which supports it. Such is not the case here.

This problem is caused principally because the Stipulation of Facts on which this proceeding is based was drafted to state the facts to show and meet Case-Swayne's assertion that Sunkist was not qualified under Capper-Volstead for two different reasons, neither of which is now asserted by Case-Swayne or considered by this Court.

The present ground, that *membership* of agency associations causes a loss of the Capper-Volstead qualification, was not asserted when the Stipulation was drafted. The Stipulation does not show such membership.

The Court has erroneously construed the arguments of the parties as a concession that the agency associations were members before October 31, 1958. They were not.

Therefore, a determination that Sunkist was not qualified before that date must be sustained on some other ground. But no other ground was presented in the petition for writ of certiorari and is therefore outside the scope of this proceeding. (Rule 23.)

The Court has not correctly stated the facts in three material particulars:

(1) The agency associations were not members of Sunkist before October 31, 1968;

(2) The agency associations do not have proprietary interests in their own right; and

(3) The agency associations do not receive a part of the anticipated return from cooperative marketing in Sunkist.

In addition, the Court has considered certain factual issues, and reached conclusions regarding them which are not supported by the record. Those issues are as follows:

1. *Is the benefit of collective marketing given to nonproducers, i.e., agency associations?* The parties *attempted* to *stipulate* that it is not, but the Court has apparently refused to accept that stipulation. It is grossly unfair to Sunkist to make a finding of fact contrary to what the parties—at least Sunkist—thought they were stipulating.

2. *Was or is Sunkist Organized or Controlled by nonproducers?* Clearly the record will not support a finding that nonproducers organized or controlled Sun-

kist. The Opinion implies that the Court feels to the contrary.

3. *Do the agency associations have a proprietary interest in Sunkist?* The Court says they do. This is based on a misconception of the revolving fund, and is in error.

4. *Does the contract between the agency association and Sunkist constitute an unreasonable restraint of trade?* The Court indicates that this is an important issue, but makes no attempt to evaluate it. The record does not include adequate facts to determine it. And yet the Court apparently *assumes* that such contracts may be an unreasonable restraint of trade.

5. *Is the agency association a bona fide agent of its growers?* Clearly growers could participate directly in Sunkist, and apparently also through bona fide agents. The Court here refuses to consider the agency associations as agents for its growers. If that refusal is based on fears that the agency associations are acting for themselves, and not their growers, the subject is not treated in the stipulation—nor the opinion, for that matter.

The record is not adequate to reach those determinations, and Sunkist should not be held to the severe standard laid down without an appropriate opportunity to be heard on these issues.

Finally Sunkist believes that the law of agricultural cooperatives is confused rather than clarified in several important respects.

I.

THE DETERMINATION BY THE COURT THAT SUNKIST WAS NOT QUALIFIED UNDER CAPPER-VOLSTEAD PRIOR TO OCTOBER 31, 1958 IS BASED ON AN ERRONEOUS STATEMENT OF FACT, AND INVOLVES DETERMINATIONS NOT WITHIN THE SCOPE OF THE QUESTION PRESENTED.

Case-Swayne[1] made a narrow, specific attack upon the Capper Volstead qualification of Sunkist: it was "whether the *membership* of a cooperative must be 'farmers' or (as pertinent to the instant case) 'fruit growers' or associations composed of fruit growers . . ." (Pet. p. 7; emphasis added.)

The attack made upon the Sunkist qualification in this Court in the briefs and argument of Case-Swayne has been a single, specific assertion; it was the *membership* of the agency association which was claimed to impair the exemption of Sunkist.

When this Court granted certiorari, it granted it on a specific question spelled out in the Petition: Did the fact that "15% of the association's *members* are not producers of agricultural products and not associations organized under said section . . ." cause the loss of the Capper-Volstead qualification? (Pet. p. 2; emphasis added.)

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[1]In order to avoid any confusion in designation of the parties, we will herein refer to the Petitioner for the Writ of Certiorari, Case-Swayne, as "Case-Swayne", and Sunkist Growers, Inc., the petitioner for rehearing, as "Sunkist."

This Court made it clear that it was the membership of the agency associations which was questioned. The Slip Opinion defines the issue as follows:

> "It is the *membership* of these agency associations in the Sunkist System that gives rise to the issue presented here." [Slip Opinion p. 3; emphasis added.]

Yet the facts are crystal clear, as hereinafter pointed out, that agency associations were not members of Sunkist Growers, Inc. prior to October 31, 1958.

The Court has avoided that problem, we submit inaccurately and unfairly, by observing in a footnote as follows:

> "Since the parties have agreed that [the 1958] changes in no way affect the issue here, we discuss Sunkist in its post-1958 form." [Footnote 4, Slip Opinion, pp. 3 and 4.]

The Court is, we believe, in error. The facts are as follows:

(1) Agency associations were not members prior to 1958.

(2) Sunkist has never agreed, stipulated, or assented to the proposition that the facts should be treated as though the agency associations were members prior to 1958.

(We have treated the examination of the record regarding these facts in more detail in Section III, A. following.)

Furthermore, since this Court has declared that Sunkist was not qualified prior to October 31, 1958, the Court obviously must have based that determination on

some ground other than the claimed membership of the agency associations in Sunkist. What is that basis? We submit that a careful examination of the Opinion makes it indeed quite difficult to isolate the criteria by which the Court determined that Sunkist was not qualified under the Capper-Volstead Act prior to October 31, 1958. (We have considered that subject in Section V, D following.)

Finally, such determination raises the critical question of whether or not the subject matter of the tests which might have invalidated the Sunkist System prior to October 31, 1958 were, indeed, included for review on this writ of certiorari. A fair reading of the question shows that it was limited to an examination of the consequences of having agency associations as "members." The use of some other basis for invalidating the Sunkist System, therefore, goes beyond the question which was stated for examination.

II.

THE BACKGROUND OF THE STIPULATION SHOWS THAT IT DOES NOT SUPPLY THE FACTUAL MATERIAL NEEDED TO DETERMINE ALL OF THE ISSUES THIS COURT BELIEVES ARE MATERIAL.

A. Many of the Grounds for Rehearing Are Due to Factual Deficiencies in the Record.

Sunkist has asserted, among other grounds for rehearing, that the Court has not correctly stated the facts in three important particulars, and that the record will not support certain other factual conclusions the Court has drawn.

These problems have arisen primarily because of the manner in which this matter comes to this Court. We

have therefore reviewed the history of the Stipulation, and the procedures relating to the Capper-Volstead defense to show how these deficiencies arose.

B. The Record Before This Court Is Limited.

There are three important and unusual limitations on the record in this case:

1. Although Case-Swayne demanded a jury, the Capper-Volstead defense was submitted to the court by stipulation, on stipulated facts.

2. The stipulation was drafted by the parties to present the facts each asserted on a challenge to Capper-Volstead qualification different from the one now asserted by Case-Swayne and decided by the Court.

3. At the trial below, the court directed a verdict for Sunkist at the conclusion of Case-Swayne's evidence. Sunkist did not put on its evidence, and therefore evidence introduced at the trial may not be considered herein unless admitted by Sunkist.

C. The Stipulation Itself Does Not Show the "Membership" of the Agency Associations.

By stipulation dated April 10, 1961, the parties submitted the question of the Capper-Volstead qualification to the District Court for determination. [R. 32, 45.]

In the stipulation, the parties declared that they had "entered into this Stipulation of Facts deemed by each to support its legal theory." [R. 33.] The stipulation dealt only with those facts regarding the organization of the Sunkist System prior to the merger of October 31, 1958, except that the stipulation did set out the fact of the merger of Sunkist Growers, Inc., Exchange

Orange Products Co. and Exchange Lemon Products Co. [R. 41.] The stipulation did not state that the agency associations were members of Sunkist, nor did it treat the organization of Sunkist with respect to membership after the 1958 merger.

The reason that the Stipulation did not cover the post-1958 situation was, of course, that the complaint did not cover it. The complaint was filed April 15, 1958 [R. 1] and covered the period from April 15, 1955 through April 15, 1958. [R. 7.]

The Supplemental Complaint was filed June 29, 1962 [R. 20] and covered the period from April 15, 1958 to January 31, 1962. [R. 24.]

By the time of the argument in the District Court regarding the Capper-Volstead qualification, March 2, 1964, the Complaint had been supplemented. The Parties simply stipulated that there had been no material change. [R. 26.]

The result is, therefore, that the parties stipulated that the facts were as they existed prior to the merger in 1958, except for the merger itself. The parties did not at any time stipulate with respect to the Articles of Incorporation or Bylaws of Sunkist following the merger, nor to the fact that agency associations had become "members" of Sunkist.

It is a fact, of course, that the Bylaws were amended to make the changes by which agency associations became members. The Articles of Incorporation as amended in 1958 and the new 1958 Bylaws were introduced in evidence at the trial. [R. 120 and 124.] Sunkist agrees that those are correct copies of such Articles and Bylaws and should be used at this proceeding, even though they were never formally incorporated into the stipulation.

After submitting the stipulation regarding the Capper-Volstead defense to the trial court, the trial court ruled on it in accordance with the parties' request. Thereafter, the case went to trial, and at the trial only Case-Swayne put on its evidence. Sunkist has not put on evidence on any subject in this proceeding other than the evidence which has been submitted in the Stipulation, and the evidence which came in on cross-examination of Case-Swayne's witnesses.

It should therefore be apparent that the only evidence before this Court is that stated in the Stipulaton, or as otherwise agreed to by the parties.

D. The Stipulation Herein Was Designed by Both Parties to Meet Challenges Other Than the One Now Sustained to the Capper-Volstead Exemption.

The present challenge by Case-Swayne is based solely on the "membership" of the agency associations in Sunkist Growers, Inc. (Pet. pp. 2, 7; Br. pp. 8, 21.) The Court's determination is apparently broader, although it also is based on the "membership" of the agency associations[2] and its conclusion that the parties are agreed that the facts were identical before and after 1958.[3]

Regarding the critical fact of membership, the Stipulation provided as follows:

> "Sunkist is a membership corporation whose members prior to October 31, 1958, were individuals

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[2]The Court defined the issue as follows: "It is the *membership* of these agency associations in the Sunkist System that gives rise to the issue presented here." [Slip Opinion, p. 3; emphasis added.]

[3]The Court noted, as observed above, "Since the parties have agreed that these changes in no way affect the issue, we discuss Sunkist in its post-1958 form." [Slip Opinion, footnote 4, pp. 3 and 4.]

appointed by and representing each of the District Exchanges, on the basis of one member for each District Exchange. Such individual members have normally been growers, but some have not been." [R. 36.]

The Stipulation did not state who were the members of Sunkist after October 31, 1958.

In its initial briefs submitted to the trial court, Case-Swayne did not challenge the qualification of Sunkist on the ground that the agency associations were members, nor, indeed, on the ground that agency associations participated in the Sunkist organization. The two specific challenges made to the Sunkist Capper-Volstead qualification were as follows:

(a) Sunkist's members were not fruit growers. "Sunkist members are individuals appointed by and representing each of the District Exchanges . . ." (Case-Swayne Op. Br. on Capper-Volstead issues, p. 7, lines 30-31 dated 5/29/61.)

(b) "Sunkist members do not meet the provisions of the Act requiring members to be natural persons and not corporations." (Case-Swayne Op. Br., Capper-Volstead Defense, p. 13, lines 5-6 dated 5/29/61.)

It was therefore for the purpose of litigating these two issues asserted by Case Swayne that the present Stipulation was drawn. The result is, therefore, that the Stipulation was not drawn by either party with the idea in mind of determining all of the facts which might arise on the basis of the issues the Court now finds determinative. Since this Court has indicated that other factual issues are, indeed, important to this determination, both parties should be given an opportunity to litigate all of those factual issues in the trial court below.

III.

THE COURT HAS NOT CORRECTLY STATED THE FACTS IN THREE IMPORTANT PARTICULARS.

A. Sunkist Has Not Agreed That the Agency Associations Were Members Before 1958.

The Court has observed that the parties have agreed that the 1958 changes in no way affect the issues here.[4] This observation is not correct. The one fact that this Court says is most critical—membership of agency associations—completely changed on October 31, 1958.

Sunkist does argue that the substantive relationship was the same before and after the 1958 merger, and that the agency associations were, in substance, not the "members" either before or after the changes. Sunkist has never agreed that the agency associations were "members" before 1958.

If the Sunkist argument has misled the Court into the belief that Sunkist consented to the proposition that agency associations should be treated as members prior to 1958, we express regret for the result, but believe it would be unfair to hold Sunkist to an agreement which factually did not occur and which is factually incorrect.

As we have pointed out in reviewing the history of the stipulation above, it simply states that the members

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[4]In Footnote 4, appearing on pages 3 and 4 of the Slip Opinion, the Court observes that in 1958 Sunkist altered its structure in two respects; first, local associations became members of Sunkist whereas before they had been represented through the District Exchanges, and second, the two wholly owned subsidiaries were merged into Sunkist. The Court then observes, "Since the parties have agreed that these changes in no way affect the issue here, we discuss Sunkist in its post-1958 form."

of Sunkist were "individuals appointed by and representing each of the District Exchanges . . ." [R. 36.] There is no further information on membership in Sunkist in the stipulation.

Thus the facts are clear that agency associations were not members of Sunkist before October 31, 1958. If the Sunkist System was not qualified under Capper-Volstead before that date, it must be for some other reason. Yet the *membership* of the agency association was the sole basis asserted by Case-Swayne, and the question on which certiorari was granted by this Court.

B. The Agency Associations Have No Proprietary Ownership in Sunkist, in Their Own Behalf.

This Court points out that the local associations, which include the agency associations, "have the proprietary ownership of Sunkist's assets." [Slip Opinion, p. 4.]

That statement is only a half-truth, and is substantively erroneous. All proprietary interests held by agency associations belong to the growers.

The property rights in Sunkist, are determined by the revolving fund. A deduction is made each year from the proceeds of sale, and retained by Sunkist to handle its capital requirements. As additional sales are made, the oldest of the revolving fund credits are repaid to the growers. [R. 126-127.] In addition, in the possible event of dissolution or liquidation, any remaining assets of Sunkist would be distributed in proportion to the revolving fund credits. [R. 127.]

Under the Sunkist Bylaws all proceeds of sales are returned to the persons entitled thereto on the basis of quantity or value of products furnished. [R. 150.] Under the Bylaws the person entitled thereto are in the first instance either the District Exchange or the local association, including the agency association.

However, the agency association is then obligated to return them to the grower. The typical contract between the grower and an agency association provides: "The company will render to the grower a statement showing the net amount due, and will thereupon pay to the grower the amount of said net proceeds . . .". [Ex. B to Stipulation, R. 71.] The net proceeds are defined by the immediately preceding paragraph as the proceeds received on the sale of the fruit less costs and the fixed charge for handling the fruit. [R. 71.] Since the revolving fund credits are part of the net proceeds, they must be returned to the grower.

This end result is expressly confirmed by the Bylaws of Sunkist which provide as follows:

> "The primary purpose for which Sunkist is formed is to furnish facilities and agencies through which the citrus fruit of its members and other producers may be marketed or processed and marketed, and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses, on the basis of the quantity or value of citrus fruits marketed for such member or other producer." [R. 124.]

Thus, to say that the agency associations have a part of the proprietary interest in Sunkist is erroneous. Only to the extent that the revolving fund credits are

created by the agency association as an actual grower [some are and some are not growers; R. 35], does the proprietary interest vest in the agency association.

Under almost identical language in the series of agreements setting up the Walnut Growers Association, the California courts have determined that that kind of provision required the distribution of reserve funds retained by the central cooperative to the ultimate producer. See *Bogardus v. Santa Ana Walnut Growers Ass'n.*, 41 Cal. App. 2d 939 (1940).

C. The Agency Associations Do Not Receive a Part of the Anticipated Return From Cooperative Marketing in Sunkist.

One of the principal concerns in this Opinion is whether or not the agency associations receive the benefits of cooperative marketing. The Court has concluded that the agency association may receive such benefit. It stated as follows:

> "It may well be that the fixed fee is dependent on the benefits of collective marketing through Sunkist, in the limited sense that it represents to the parties what one can charge and the other can pay, both anticipating the return the grower may achieve through pooling his fruit with the Sunkist organization." [Slip Opinion, p. 6, Footnote 5.]

The Court thus assumes that the agency association may furnish its facilities on some basis which is tied to or influenced by the net returns from the sale of the product handled. The parties have stipulated directly to the contrary:

> "Such agency association furnishes its facilities and services on an independent contract basis,

wholly unrelated to the net returns from the sale of the product handled." [R. 36; emphasis added.]

The Court has thus refused to accept the stipulated fact of the parties, and has not given the parties an alternate opportunity to introduce evidence on the subject.

IV.

SEVERAL KEY "FINDINGS" OF THIS COURT ARE NOT SUPPORTED BY THE RECORD.

There are a number of key facts, some relatively simple, some quite complex, which have been stated by this Court in this proceeding. In the instance of each of the following factual determinations, the present record is not adequate to support or require such determination.

(a) Finding No. 1: The Agency Association Receives the Benefit of Cooperative Marketing Through the Sunkist System.

As Sunkist views the Opinion of the Court, the Court agreed with Case-Swayne that the test of qualification under the Capper-Volstead Act was whether or not the benefits of collective marketing were limited to actual producers. The House Report is quoted as follows:

> "These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" [Slip Opinion, p. 7; emphasis by the Court.]

The Court also notes that various other passages of the legislative history of the Act support the determina-

tion that "it was intended that only actual producers of agricultural products be covered by the legislation. . . ." [Slip Opinion, p. 8.]

The Court thus seems to conclude that Sunkist runs afoul of the limitations of the Capper-Volstead Act because benefits are given to agency associations. Yet such finding runs directly contrary to what the parties obviously attempted to state in the stipulation before this Court. The parties expressly stipulate as follows:

> "The packing house facilities of the Agency Association are made available to the producers on the basis of the fruit being packed for marketing at cost plus a fixed fee. The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and a fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 35-36.]

The concern of the Court over the factual accuracy of the stipulated fact was repeated by numerous questions from the Court which required a substantial part of the time at oral argument. The concern of the Court over the fairness of the contracts with agency associations for fixed fees was also illustrated during the oral argument, and is expressed in Footnote 5 on page 6 of the Slip Opinion.

The essence of the Court's decision, however, is that the agency association does receive the benefit of cooperative marketing, which is directly contrary to the spirit and intention of the stipulated facts before the Court.

The speculation by the Court in Footnote 5 that the charge of the agency association may be affected by the anticipated return is flatly contrary to the Stipulation that the agency association "furnishes its facilities and services on . . . [a] basis wholly unrelated to the net returns from the sale of the product handled." [R. 36.]

The parties were trying to stipulate that the agency association did not receive the economic benefits of collective marketing. They certainly were not stipulating to the contrary. Yet this Court has found to the contrary.

If the Court believes the stipulation is inaccurate, or is unwilling to accept it for any other reason, the parties should be given an opportunity to develop the factual information for the Court. But it is unfair to charge Sunkist with a "fact" where the parties were attempting to stipulate to the contrary.

(b) Finding No. 2: The Agency Association Has, to Some Extent, "Organized and Controlled the Sunkist Organization."

A second fact necessarily found by this Court is that the agency association to some extent has organized and controlled the Sunkist System. The Court points out that certain language in the statute "was designed to insure that qualifying organizations be truly organized and controlled by, and for, producers." The result of this Opinion is to say that Sunkist does not qualify because it is either "organized" or "controlled" by agency associations.

No portion of the Stipulation was specifically pointed toward the organization of Sunkist, except that the his-

tory of the System set out in paragraph 9 of the Stipulation shows it was the "growers" who initially built the organization. [R. 37-43, 38.] Nothing in the record would support the assertion that the System was organized by agency associations or any nonproducer.

The Court was greatly concerned with "control" of the Sunkist System. Clearly the record would not support a conclusion that Sunkist is controlled by nonproducers. All it would support is a determination that the growers contract with and designate agency associations, and that the associations participate on a representative basis in the eventual selection of the Sunkist board of directors, and vote on certain varietal matters.

If this decision turns on an element of *factual control* by nongrowers, or on a question of whether nongrowers are acting from an element of personal gain this stipulation does not cover these facts.

Until this Opinion was issued, no one, including Case-Swayne, had asserted that Sunkist was "organized" or "controlled" by nongrowers. If this now is a material issue, it should be fully developed, and not determined on information submitted to resolve other factual problems.

(c) Finding No. 3: The Agency Association Has a Proprietary Interest in Sunkist.

This Court stated that the local associations, which include the agency associations, "have a proprietary ownership of Sunkist's assets." [Slip Opinion, p. 4.] The statement is inaccurate.

We have explored this point in more detail, under point III B above, and shown that under the typical

agreement between the agency association and the grower, the agency association is obligated to return to the grower all of the proceeds of the sale of the fruit, which includes all of those interests which have been called "proprietary ownership" of Sunkist's assets under its Bylaws.

As a result, the Court's observation that the agency associations own proprietary interests in Sunkist is in error. The revolving funds, which represent the capital requirements and net worth of Sunkist must ultimately be returned to the grower who produced the fruit which created the credits in the revolving fund.

(d) Finding No. 4: The Contracts Between Sunkist and the Agency Association (May) Constitute an Unreasonable Restraint of Trade.

A most critical area where the Court has reached at least a tenative conclusion has to do with whether or not the arrangements between Sunkist Growers and agency associations constitute an unreasonable restraint of trade.

The Court observes [Slip Opinion, p. 11] that Sunkist made the argument that the membership of agency associations had no economic significance because the fruit of the agency associations could be handled as nonmember fruit. The Court then declares:

> "But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. 'The rights of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.' [Citing *United States v. Borden Co.*]"

The meaning of this passage is highly obscure and confuses an important area of the law, as is hereinafter pointed out. (Sec. V, C.) We are not dealing here with "any conspiracy . . . in restraint of trade that these producers may see fit to devise." We have not asked for a blank check on any kind of dealings with nonexempt entities. We are dealing here with a specific kind of plan used by Sunkist for over forty years and not heretofore challenged.

Is this Court declaring that, *whatever may be the effect of Sunkist dealings with agency associations,* all such dealings constitute an unreasonable restraint of trade?

If the Court is, then it has made a finding of fact that this is an unreasonable restraint. No facts in the record are devoted to this question, nor does this Court give any consideration to the evaluation of such question.

On the other hand, if this Court makes no such finding, then such agreements may be proper; the fruit could then be handled by Sunkist as nonmember fruit, and the fact that the fruit is handled through agency associations has no economic significance.

Of course, the citing of the oblique reference to this problem in the *Borden* quotation leaves the parties guessing as to what the Court means.

The conclusion remains, however: the facts were not submitted to this Court to evaluate whether or not such contracts constitute a restraint of trade; the parties did not brief or argue the point; and the opinion of the Court shows no evaluation of the point.

(e) Finding No. 5: The Agency Association Is Not a Bona Fide Agent for Its Growers.

The principal argument by Sunkist is and has been that there is no economic significance to "membership", but that the same effective economic result can be reached in other ways. When that argument is described in the Opinion, the only possible method of accomplishing that result considered by the Court was treating the agency association fruit as nonmember fruit. [Slip Opinion, p. 11.]

That description, of course, does not fairly characterize the Sunkist argument regarding economic significance. (Sunkist Br., pp. 47-51.) That argument had two bases: the same result could be reached either by showing that "the agency association serves the same economic and cooperative purpose for its growers as the cooperative association does for its growers" (Sunkist Br. p. 49), or that the "agency association is, in fact, an agent for its growers in marketing the growers' fruit". (Sunkist Br. p. 51.)

The argument was stated as follows on pages 49 and 50:

> "The only effective economic difference between the use of a cooperative association and the use of an agency association is that the grower or growers who do not wish to put up the initial capital to create and maintain a plant for processing oranges for delivery may contract with an agency association to supply that service and those facilities and to act as marketing agent through Sunkist.
>
> "If a farmer doesn't have the capital to help to build a plant, or if he believes he can contract for

> a plant more cheaply than building one, he should be permitted to do so. Congress wanted particularly to help the impecunious farmer, and to encourage efficiency in handling the product."

Neither the present Opinion of the Court nor Case-Swayne, challenges the proposition that if the growers had participated directly, or had dealt through cooperative associations, the Capper-Volstead exemption would have been secured. Nor does either challenge the proposition that growers may employ appropriate agents to handle their business, either the physical processing or the marketing of the fruit.

For example, cooperative associations can certainly hire labor to handle the fruit and to process it. They may certainly hire salesmen to attempt to sell their fruit; and undoubtedly they can hire a general manager and appropriate executive officers to assist in making the important decisions of marketing. Could they not, therefore, employ the agency associations, as they have sought to do, to handle the processing of the fruit and assist in the marketing of the fruit?

If there is a vice to the "agency arrangement" it can only be that either the agency is not a bona fide agency, or that it amounts to an unreasonable restraint of trade. There has been no claim by Case-Swayne that either of these situations is true, and therefore no attempt by Sunkist to set out the necessary factual information which would show that these claims are untrue. Yet this Court has reached one or the other of those conclusions without any support in the record. If these matters are material to the Court's decision, as the Opinion indicates, the parties should now be given a full

opportunity to develop the factual information regarding them.

It should be noted that it is not necessary to lay down the severe rule which is declared by this Court in order to prevent the spectre of having control of Sunkist residing in the hands of agency associations. As in so many other matters affecting antitrust laws, the question should be one of fact in each case: Is the agency a bona fide relationship, carried out for the benefit of the grower? Does the grower, in fact, control the association? Is the association being used for some ulterior purpose? More specifically, is the association being used for the private purposes of the agency association? These are factual questions which can be litigated and resolved in any case. There has been no reason to supply the Court with this factual information in this case, because, to this point, no one has challenged the good faith of the Sunkist operation.

V.

THE PRESENT OPINION CONFUSES RATHER THAN CLARIFIES THE LAW OF AGRICULTURAL CO-OPERATIVES IN SEVERAL VITAL AREAS.

A. The Court's Holding That the Capper-Volstead Act Is to Be Strictly Construed Against Agricultural Cooperatives Represents a Radical Change in the Construction of These Remedial Statutes, and Is Contrary to the Expressed Intention of Congress.

Congress has on many occasions expressed its intention to favor the formation of agricultural cooperatives and to be liberal in the method in which such organization is permitted.

See, *e.g.* 12 U.S.C. § 1141;
7 U.S.C. § 455.

The House Committee Report on the Capper-Volstead Act made the intention of Congress entirely clear:

> "The aim has been to make the provisions of the Bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this Bill."
>
> (H. R. Rep. No. 24, 67th Cong., 2d Sess. (1921).)

The Courts have reached the same conclusion. This Court has said that it is the "economic significance" which is important, not "organizational distinctions of de minimis meaning. . . ."

> *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).

The Agricultural Marketing Act is "a remedial statute, entitled to liberal construction. . . ."

> *Interstate Commerce Comm. v. Jamestown Farm, U.F. Coop T.A.*, 151 F. 2d 403, 404 (8th Cir. 1945.)

Again referring to the Agricultural Marketing Act, the "Act was intended to encourage the organization and operation of farm cooperatives; its terms are to be liberally construed to effectuate that purpose."

> *Northwest Agricultural Cooperative Ass'n. v. Interstate Commerce Comm.*, 350 F. 2d 252, 257 (9th Cir., 1965).

For the first time, the Court has taken a position directly contrary to the expressed intention of Congress in liberally construing the statutes. The Court now applies the doctrine of *Allen Bradley Co. v. Local No.*

3, 325 U.S. 797, 809 (1945) and states that we are now dealing with special exceptions to a general legislative plan. What effect is this to have on the numerous decisions which have preceded, under the warm light of liberal construction? Are these cases now impliedly overruled?

This decision now declares that agricultural cooperatives must not only comply with the substantive requirements of these statutes but must fit into a precise legal format to reach the objective.

B. The Present Opinion Creates Doubt Regarding the Potential Liability of a Federated Cooperative, and in Particular the Potential Scope of Liability of Sunkist in This Particular Case.

The Court here limited the determination to a narrow point: "All we decide is that Sunkist Growers, Inc. is not entitled to assert Capper-Volstead as a defense to the suit based on §1 of the Sherman Act." [Footnote 15, Slip Opinion, p. 12.]

We thus start with the proposition that Sunkist Growers, Inc., is not an exempt organization and that the agency associations are not exempt organizations. However, there are many cooperatives within the Sunkist System which, as individual units, undoubtedly are qualified as Capper-Volstead cooperatives. Furthermore, there are many growers dealing directly with their own products or with the exempt cooperatives whose conduct undoubtedly is covered by the Capper-Volstead Act.

The court's decision creates a complex of difficult problems which not only must be faced by the trial court in this case on retrial but by agricultural cooperatives

generally. Where an exempt cooperative has dealings with non-exempt organizations, does the exempt cooperative risk its qualification under Capper-Volstead? Or is the sole test simply whether or not the dealings between the cooperative and the non-exempt entity constitute a reasonable exercise of business judgment, or whether they may constitute an unreasonable restraint of trade?

We would assume, for example, that dealings between the parts of the Sunkist System which are qualified are still exempt; that dealings between those exempt cooperatives and individual growers are still exempt. We would assume that the exempt cooperative might employ Sunkist as its marketing agent, so long as such employment was on a reasonable basis. We would further assume that growers may employ agency associations as marketing agents, so long as the arrangements are reasonable. Furthermore, it would follow that dealings between Sunkist and the agency associations would not subject Sunkist to liability so long as they were reasonable, and the "agents" were acting as marketing agencies in common for growers or cooperative associations.

Conversely, then the area of potential liability would appear to be the area in which the dealings of any of the parts of the Sunkist System with agency associations constitute an unreasonable restraint of trade.

This is, of course, precisely the rule which Mr. Justice White would lay down in his concurring opinion. He pointed out that "Case-Swayne should not recover for injury to its business caused by other intercooperative or intergrower transactions and not resulting from the forbidden relationship between an exempt and a

nonexempt entity." [Concurring Opinion, Justice White, p. 4.]

The Court's opinion does not say how this issue should be resolved. On retrial, therefore, the trial court must make a determination on this issue in deciding what evidence will be admitted and how it will instruct the jury. In the absence of clarification by this Court, Sunkist will take the position in the trial court that the rule hereinabove stated by Justice White is the correct one, and that the Opinion of the Court has not expressed an opinion on that subject.

In addition, to the extent that plaintiff challenges any of the conduct of Sunkist in this case, Sunkist will assert, on retrial, that such conduct is not an unreasonable restraint of trade in the light of the Sherman Act, the Clayton Act and the provisions of the common law.

But more important than the scope of the potential liability in the present case—as critical as that is to the interests of the citrus growers in Sunkist—the present Opinion now leaves in doubt the extent to which federated cooperatives or any cooperatives may employ others to act for them, either in processing, or as marketing agents, separately or in common.

C. The Comments of the Court Regarding Nonmember Fruit Are Ambiguous, and Will Cause Great Confusion and Difficulty of Application.

For the first time, this Court has interpreted the nonmember fruit clause of the Capper-Volstead Act. The Act, of course, provides for joint action in cooperative marketing of fruit, provided that "the Association shall not deal in the products of nonmembers to

an amount greater in value than such as are handled for it by members."

This clause has appeared to be a clear authorization to a cooperative to market nonmember fruit up to the amount of member fruit handled, without the risk of the assertion that such arrangement constituted a combination or conspiracy in restraint of trade, or that it created a monopoly. Unfortunately, the present opinion does not state any governing rules, but treats the subject obliquely so that the result is left in considerable doubt.

The treatment of this subject is presently introduced in the Opinion by the characterization of a Sunkist argument that "membership" of the agency association has no "economic significance", because the fruit could have been handled as nonmember fruit. There then follow the two vital sentences on this subject:

> "But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. 'The right of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that those producers may see fit to devise." [Citing *United States v. Borden Co.*, 338 U.S. 188, and *Maryland and Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458.]

The fundamental question remains unanswered: Does the Capper-Volstead Act give any kind of approval to the handling of any nonmember fruit? Congress wanted specifically to improve the market position of the cooperatives; is the additional fruit which is

brought into the cooperative through nonmember contracts to be considered as any other ordinary business contract, and if it strengthens the cooperative's marketing position, is the cooperative running the risk of a claim of monopoly, attempted monopoly, or unreasonable restraint of trade?

Unfortunately this passage in the Opinion confuses what has been a settled and uniform practice among agricultural assocations for forty-five years following the adoption of the Capper-Volstead Act, in handling nonmember fruit.

D. The Basis for the Court's Determination Is so Unclear as to Leave Agricultural Cooperatives in Doubt of Their Position, and to Foster Needless, Expensive Litigation.

It is often difficult to extract from an opinion a single, clear cut statement of its determination. Here, we submit, there is no basis realistically stated to use as a future guide post. The only potential bases Sunkist can find in the Opinion, and its comments, are as follows:

(1) Agency Associations Cannot Be "Members" of Sunkist.

This was Case-Swayne's position. The Court apparently rejected that as the sole test, because the Court found no materiality to the fact that agency associations were not members before October 31, 1958.

(2) Agency Associations Have Property Rights in Sunkist.

If this principle is the basis of the decision, it must fall. The facts show that agency associations do not have property rights in Sunkist for their own account.

(3) Compensation Paid to Associations Gives Them the Benefit of Collective Marketing.

The Opinion indicates that this is the basis of the decision. Yet it is directly contrary to the parties' stipulation.

(4) The Relationship Between Agency Associations and Sunkist Increases Sunkist's Share of the Market.

The Court has concluded that in one respect the agency associations do have economic significance. This conclusion is based on the finding by this Court that the membership of agency associations in Sunkist directly increases Sunkist's market share. This finding is not supported by any fact in the record, and is directly contrary to what we believe is the most reasonable inference, namely, that growers market through Sunkist because of the benefits of cooperative marketing. In any event, changes in market share are not relevant to Capper-Volstead qualification.

This challenged finding follows the Court's statement that the 8% limitation on dividends in a stock corporation was designed to insure that the organization would be organized and controlled by and for producers. The Court then pointed out that even though these clauses recognized that nongrowers could participate in the capital structure, the provisions do not affect this case, because obtaining capital from nonproducers "does not directly enlarge the market share already possessed by the producers themselves. The participation in Sunkist of agency associations has precisely that effect." [Slip Opinion, p. 11.]

As we have said, this finding is not supported by the Stipulation of Facts. The Stipulation does point to

a number of facts which have led growers in the past to market through Sunkist. It does not say that the existence of agency packing houses was one of these facts. Sunkist believes that the existence of agency packing houses is a benefit to the growers who do not desire to have their capital tied up in a packinghouse; Sunkist does not believe, however, and there is nothing in the Stipulation which provides that significant numbers of growers are now marketing their fruit through the Sunkist system because of the membership of agency associations. In short, the Court's finding has necessarily been based upon assumed facts outside the record.

Furthermore, market share is irrelevant to Capper-Volstead qualification. When fruit, is marketed cooperatively, the cooperative's market share is increased without regard to the manner in which the fruit enters the system. Even if it is assumed that the market share of Sunkist is increased because fruit has been brought into the system through agency houses, this fact has no legal significance, because the same economic result could have been achieved by enrolling those producers who market through agency associations directly as members of Sunkist, or into other cooperative associations. *The Court is now relying solely on a matter of form:* the "economic importance" is ignored.

Furthermore, this Court has already laid down appropriate safeguards regarding the operation of Capper-Volstead cooperatives. If such cooperatives conspire with others to restrain trade unreasonably (*United States v. Borden*), or if they unreasonably restrain trade (*Maryland and Virginia Milk Producers Ass'n.*

v. United States) or, if they are guilty of monopolization (see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*) they will be responsible for the damages proximately caused.

But each of these cases recognizes that farmers may combine to market their products and increase their market influence by such combination.

Despite the Opinion adverse to Sunkist, we find no indication in it that the Court has refused to accept Sunkist's claim that the principal benefit of including growers in the Sunkist System through the agency associations was to return to those growers the same economic benefit that other Sunkist Growers obtain. Thus the observation of the relationship of market share to the Capper-Volstead qualification is particularly confusing, and does not justify the present decision.

(5) The Agency Associations Have Voting Rights in Sunkist.

More broadly stated, the Court has made it clear that nongrowers cannot "control" a Capper-Volstead cooperative. But the facts here do not show control by nongrowers, nor has any such control been asserted by anyone.

The Court has observed, however, that although District Exchanges have the voting rights with respect to the Board of Directors of Sunkist, local associations including agency associations have voting rights on all other matters. [Slip Opinion, p. 4.]

The Capper-Volstead Act specifically permits the growers to hire a marketing agent, and permits the marketing agent to act in common with other marketing agents. If a marketing agent may actually handle

the marketing of the product, can he not do that which is so much less? In other words, can he not simply participate in the selection of the governing body of the common marketing agent, so long as he is acting for the interests of his grower? Is there a prohibition against the grower's giving his proxy to his agent?

Should such participation be a *per se* termination of the Capper-Volstead exemption? Does the mere fact of such a vote cause the loss of the exemption, or shouldn't the general rule apply regarding dealings with outsiders: is the conduct reasonable under all of the circumstances? If, none the less, it is this element which causes the loss of exemption, should not the rule be so declared so that cooperatives generally may know that it is specifically the element of having a vote in the cooperative system which will require adjustment and reorganization of the cooperative structure?

Conclusion.

The decision in this matter will have far reaching effects on agricultural marketing—far more so than is readily apparent. Of course Sunkist alone acts on behalf of some 10,000 growers, who must ultimately bear the economic burden of this and other litigation which will be spawned by this decision, and any potential liabilities therefrom.

As certain as is the probability of a physical event, once appropriate forces are set in motion, is the reduction of cooperative marketing from this opinion. It can operate only in one direction: discouraging agricultural

producers from acting together, discouraging them from obtaining and using necessary processing and marketing facilities, and forcing withdrawal and dissolution to avoid situations now said to be of doubtful legality.

This opinion accomplishes two major revolutions in quiet words. Disposition of nonmember fruit, even though the economic benefits are returned to the growers on the same basis as to member-growers, is now suspect. Presumably the Capper-Volstead Act had authorized marketing of up to fifty percent nonmember fruit. Now every contract of every cooperative regarding nonmember fruit is suspect under this Opinion.

Second, all three branches of government have recognized the monumental problems of agriculture. All have cooperated to assist cooperative marketing by agricultural producers. The courts and Congress have expressly declared that the statutes should be liberally construed to this end.

The Supreme Court has now said that that day has passed. Statutes aiding cooperatives will be strictly construed. The cooperatives must not only meet the substantive requirements framed by Congress, but they must not follow, at their peril, an organizational blueprint dimly drawn by the Court, and not specifically required by Congress. Whether the formal defect resulted in actual misuse of abuse of the system is not material; whether it had economic impact on the growers, the public or competition is not the test. The only test is form: did the nongrower somehow participate. The

court will not pursue whether good or ill resulted, whether the arrangement was reasonable or unreasonable.

This severe result is not necessary to reach any rule or regulation of cooperatives. If the test is control of cooperatives, benefit from its operation, or whether there is an unreasonable restraint of trade, all of such tests should be governed by a factual test in the light of a rule of reason.

Respectfully submitted,

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Certificate.

I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

Dated: January 11, 1968.

SETH M. HUFSTEDLER

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1967.

Case-Swayne Company, Inc., Petitioner, *v.* Sunkist Growers, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Marshall delivered the opinion of the Court.

This is a treble damage action under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for alleged violations of both § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. The District Court granted a directed verdict, at the close of plaintiff's case, for the defendant Sunkist Growers, Inc. The Court of Appeals for the Ninth Circuit reversed as to that portion of the complaint predicated on § 2 of the Sherman Act, holding that sufficient evidence was presented that Sunkist monopolized or attempted to monopolize trade in the relevant market;[1] it affirmed as to the dismissal of the Sherman Act § 1 charge, holding that Sunkist qualified as a cooperative organization under the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291,[2] and therefore could

[1] 369 F. 2d 449 (1966), cert. denied, 387 U. S. 932 (1967). See *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458 (1960); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962).

[2] Section 1 of the Act reads:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing

not be held for any intraorganizational conspiracy to restrain trade. In order to determine the scope of that exemption from the antitrust laws, we granted certiorari. 387 U. S. 903 (1967).

The issue is whether Sunkist is an association of "persons engaged in the production of agricultural products as . . . fruit growers" within the meaning of the Capper-Volstead Act, notwithstanding that certain of its members are not actually growers. We hold that it is not.

I.

The organizational structure of the Sunkist system is as follows. At the base are some 12,000 growers of citrus fruit in Arizona and California. The growers are organized into "local associations," as they are designated in Sunkist's bylaws, numbering approximately 160, each of which operates a packing house for the preparation of the fruit for market. The vast majority of these local associations—about 80% by number and 82% by volume of fruit marketed in the Sunkist system—are, it is stipulated, cooperative associations in which all members are fruit growers.[3] A few of the local associa-

agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

[3] "Limitation of membership in the local associations to actual citrus-fruit producers is a cardinal principle of the Exchange [*i. e.,* Sunkist] system." Gardner & McKay, California Fruit Growers

tions—no more than 5% by number and volume of fruit—are corporate growers whose total volume is sufficient to justify installation of their own packing house facilities.

The remainder of the local associations (also designated as "agency associations")—about 15% by number handling about 13% of the fruit in the Sunkist system—are private corporations and partnerships, owning and operating packing houses for profit. Their relationship to the growers whose fruit they handle is defined not by a cooperative agreement but by a marketing contract, *i. e.*, these packing houses contract with each grower to handle his fruit for cost plus a fixed fee. It is the membership of these agency associations in the Sunkist system that gives rise to the issue presented here.

The local associations, including these private packing houses, are members of "district exchanges," nonprofit membership corporations. The principal functions of the approximately three-score district exchanges are in the marketing of the fresh fruit of their member associations; they negotiate sales, arrange for shipment, and serve as conduits of communication between the local associations and Sunkist. Representatives of the district exchanges select the board of directors of Sunkist.

Sunkist itself, since 1958,[4] has two classes of "members": the district exchanges, whose principal member-

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Exchange System 88 (U. S. Dept. of Agriculture, FCA Cir. No. C–135 (1950)). See also Cumberland, Cooperative Marketing—Its Advantages as Exemplified in the California Fruit Growers Exchange 87 (1917). The corporate name of Sunkist prior to 1952 was the California Fruit Growers Exchange.

[4] In 1958, approximately the midpoint of the period relevant to this complaint, Sunkist altered its structure in two principal respects: first, local associations became members of Sunkist Growers directly, whereas under the old bylaws they had been represented

ship function is to select the board of directors, and the local associations, which vote on all other matters and which have the proprietary ownership of Sunkist's assets. The corporate entity Sunkist Growers, Inc., owns the trade name "Sunkist" under which the fruit of its members is marketed. It has an extensive sales organization; employs marketing and traffic specialists; and performs many other services for its members through, for example, its research facilities.

More particularly, Sunkist owns processing facilities for what is known as "product" fruit, *i. e.*, fruit that for various reasons is not sold in the fresh fruit market, but rather is used for processed fruit products such as canned or concentrated juices.

Sunkist controls approximately 70% of the oranges grown in California and Arizona, and approximately 67% of the product oranges. This control is manifested through various contractual agreements. For example, each grower in the cooperative local associations agrees that he will market all of his fruit through his association. Each grower who contracts with an agency association packing house appoints it as the marketing agent for all of his fruit. That agreement is generally for five shipping seasons, although it may be canceled at any time "by mutual consent" or on written notice by the grower during August of any year in which it is in force. An escape clause permits the grower to sell such fruit as may be "mutually agreed upon" between him and the packing house to others, if he can obtain a price higher, in the judgment of the packing house, than that which the grower would obtain through his agreement with it. Should the grower be so released from his agree-

through the district exchanges; second, two wholly owned corporate subsidiaries of Sunkist—Exchange Lemon Products Co. and Exchange Orange Products Co.—were merged into Sunkist. Since the parties have agreed that these changes in no way affect the issue here, we discuss Sunkist in its post-1958 form.

ment, he is to pay to the packing house $2.50 per ton of fruit released.

Each of the local associations, including the private packing house agency associations, contracts with its district exchange and with Sunkist Growers, Inc., to market all of its fruit—product and fresh—in the Sunkist system. Each association, under the Sunkist-District Exchange-Association Agreement, reserves the right to decide to what market it will ship and what price it is willing to receive for its fruit; however, Sunkist may decide to pool product fruit and fruit for export, in which event that fruit is handled solely in Sunkist's discretion. Sunkist also determines "the maximum amount of fruit to be marketed currently," and allocates the "opportunity to ship equitably among Associations." Each local association agrees not to release any of its growers from the marketing contract without notifying its district exchange and Sunkist, and must obtain the approval of both if releases total more than 5% of the volume of the particular variety of fruit handled by the association. Further, each district exchange and local association agrees that "all prices, quotations and allowances shall be issued and distributed solely by Sunkist."

Petitioner Case-Swayne manufactures single-strength orange juice and other blended orange juices. In its complaint, insofar as relevant to the issues here, petitioner charged that the Sunkist system was a conspiracy in restraint of trade in violation of § 1 of the Sherman Act, the effect of which was to limit sharply the supply of product citrus fruit available to petitioner during the period covered by the complaint.

II.

Section 1 of the Capper-Volstead Act (see n. 2, *supra*) privileges collective activity in processing and marketing on the part of "persons engaged in the production of

agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." 42 Stat. 388, 7 U. S. C. § 291. Despite that specific language, Sunkist argues that Congress, in enacting the measure, intended to give sanction to any organizational form by which the benefits of collective marketing inured to the grower; and that, because the agency packing houses, by charging cost plus a fixed fee [5] for their services, do not participate directly in the gain or loss involved in the collective marketing of fruit through the Sunkist system, they are in the Sunkist system a privileged form of organization for the growers who contract with them.[6] We think that argument misconceives the requirements of the Act and runs counter to the relevant legislative history.

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[5] Under the marketing contract, the agency packing house obtains for its services "all of its costs of every kind incurred in connection with" processing and marketing the fruit; the so-called "fixed fee," in the contract in this record, is an amount "not in excess of 5 cents per field box on grapefruit, 10 cents on oranges," etc. We are not advised how that fixed fee is determined, other than that it is the result of bargaining between the company and the grower. It may well be that the fixed fee is dependent on the benefits of collective marketing through Sunkist, in the limited sense that it represents to the parties what one can charge and the other can pay, both anticipating the return the grower may achieve through pooling his fruit with the Sunkist organization. The stipulation, we note, provides only that the agency association "does not itself participate in either the gain or loss involved in marketing fruit through Sunkist *beyond* the recovery of its costs and fixed fee for packing." (Emphasis added.) In our view, however, that discrepancy in the record is not crucial to the decision here.

[6] The majority below held that the issue here was resolved *sub silentio* in favor of Sunkist in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962). But nongrower participation in Sunkist was neither pointed out nor the issue raised in that case; indeed, it was conceded by the respondent there that Sunkist was a Capper-Volstead cooperative.

Congress enacted § 6 of the Clayton Act in response to the urgings of those who felt the Sherman Act's prohibition against combinations in restraint of trade might be applied to imperil the development of cooperative endeavors, principally unions.[7] That section provided that the antitrust laws were not to be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit," *i. e.*, such organizations were not to be deemed "illegal combinations or conspiracies in restraint of trade . . . ." 38 Stat. 731, 15 U. S. C. § 17. From the standpoint of agricultural cooperatives, the principal defect in that exemption was that it applied only to nonstock organizations. The Capper-Volstead Act was intended to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock.[8]

The reports on both H. R. 13931, the predecessor bill that failed of passage, and H. R. 2373, which became the Capper-Volstead Act, state:

> "Section 1 defines and limits the kind of association to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" (Emphasis added.) H. R. Rep. No. 24, 67th Cong., 1st Sess., 1 (1921); H. R. Rep. No. 939, 66th Cong., 2d Sess., 1 (1920).

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[7] See H. R. Rep. No. 627, 63d Cong., 2d Sess. 14–16 (1914); *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797 (1945).

[8] The purpose and object of the limited exemption of the Capper-Volstead Act is fully discussed in *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458, 464–468 (1960); see also Hanna, Antitrust Immunities of Cooperative Associations, 13 Law & Contemp. Prob. 488 (1948).

That it was intended that only actual producers of agricultural products be covered by the legislation is demonstrated in the debates on the two bills, *e. g.*, the following exchange involving Senator Kellogg, a principal sponsor of the measure:

> "Mr. CUMMINS. . . . Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?
>
> "Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?
>
> "Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.
>
> "Mr. TOWNSEND. They must be persons who produce these things.
>
> "Mr. KELLOGG. Yes; that has always been the understanding."[9]

[9] 62 Cong. Rec. 2052 (1922). See also 60 Cong. Rec. 369 (1920) (remarks of Senator Lenroot). It is significant that an amendment was offered on the floor of the Senate to bring within the bill processors of agricultural products where the grower's return depended upon the price the processor obtained for the finished

To be sure, a principal concern of Congress was to prohibit the participation in the collectivity of the predatory middleman, the speculator who bought crops in the field and returned but a small percentage of their eventual worth to the grower. Sunkist focuses on the expression of that concern, urging that the agency associations are not such predatory middlemen. That focus is wide of the mark. We deal here with "special exceptions to a general legislative plan," *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797, 809 (1945) (§ 6 of the Clayton Act), and therefore we are not justified in expanding the Act's coverage, which otherwise appears quite plain. The Act states those whose collective activity is privileged under it; that enumeration is limited in quite specific terms to producers of agricultural products.[10]

Nor does the proviso in § 1—"that such associations are operated for the mutual benefit of the members thereof"—broaden the earlier language. That provision, in conjunction with the other prerequisites for qualification

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product, reference being made to the beet sugar manufacturer. 62 Cong. Rec. 2273 (1922). Like Sunkist's argument here, it was stated that "the beneficiary of this [amendment] would be the producer." *Id.*, at 2274. But as Senator Norris stated in opposition to the inclusion of the processors (*id.*, at 2275):

"They are not cooperators; they are not producers; it is not an organization composed of producers who incorporate together to handle their own products . . . ."

The amendment was rejected. *Id.*, at 2275, 2281.

[10] See Hulbert, Legal Phases of Farmer Cooperatives 170 (U. S. Dept. of Agriculture, FCS Bull. No. 10, 1958):

"This and other language which appears in the act make it plain that a cooperative, to come within the act, must be composed of producers."

See also Hulbert, Legal Phases of Cooperative Associations 45 (U. S. Dept. of Agriculture, FCS Bull. No. 1106, 1922); Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 385 (1958); 36 Op. Atty. Gen. 326, 339 (1930); Note, 44 Va. L. Rev. 63, 69–70, 100 (1958).

under the Act—that either each member be limited to one vote without regard to the capital he furnished or that dividends on capital be limited to 8%, and that dealings in products of nonmembers be limited—was designed to insure that qualifying associations be truly organized and controlled by, and for, producers. In short, Congress was aware that even organizations of producers could serve a purpose other than the mutual obtaining of a fair return to their members, as producers, or be controlled by persons other than producers, and the proviso adds a measure of insurance that such organizations do not gain the Act's benefits.[11] Moreover, virtually the only mention in the legislative history of possible participation in a Capper-Volstead cooperative by nonproducers occurs with respect to cooperatives issuing capital stock.[12] Whatever may be the effect and significance of that recognition of the financial stake of nonproducers in an otherwise solely producer organization, their participation and role being narrowly restricted by the voting and dividend prerequisites of the Act, it is unpersuasive here. Capital participation by non-

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[11] Cf. *Sheffield Farms Co.*, 44 F. T. C. 555 (1948); *Gold Medal Farms, Inc.*, 29 F. T. C. 356 (1939).

[12] *E. g.*, 62 Cong. Rec. 2271 (1922); 60 Cong. Rec. 365 (1920). Sunkist—a membership, rather than stock, corporation—points out that it, then known as the California Fruit Growers Exchange, was favorably referred to during the debates, see, *e. g.*, 62 Cong. Rec. 2052, 2267, 2271, 2277 (1922); 60 Cong. Rec. 312, 315, 360–361, 370 (1920). There is nothing to show, however, that Congress was aware that nonproducers participated in the marketing of fruit in the Sunkist system; in our reading of those references, it is more likely that Congress assumed the organization was solely of producers. For that matter, Senator Walsh, for one, doubted that the Exchange's federation of cooperative associations would even be encompassed by the Act (62 Cong. Rec. 2277–2278). In any event, we cannot take those remarks as intending specific approval of Sunkist, in light of the language of the Act and its other history.

producers—and that is the extent to which the debates can fairly be read as contemplating their participation at all [13]—does not directly enlarge the market share already possessed by the producers themselves. The participation in Sunkist of the agency associations has precisely that effect.

Sunkist suggests that "membership" of the agency associations has no "economic significance," relying on that provision of the Capper-Volstead Act permitting an association to deal in the products of nonmembers. The argument is that if the agency packing houses were not members of the Sunkist system, Sunkist would still be free to handle their products. But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. "The right of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U. S. 188, 204–205 (1939); accord, *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458, 466–467 (1960). Moreover, the agency associations participate in the control and policy making of Sunkist, even though they may be private profit-making operations.[14] We think Congress did not intend to allow

[13] It was recognized, for example, that producers who desired to organize for collective marketing might not have, at the outset, the necessary finances to do so, and might therefore seek capital from nonproducers. See 60 Cong. Rec. 365 (1920) (remarks of Senator Walsh); 62 Cong. Rec. 2271 (1922) (same); 62 Cong. Rec. 2273 (1922) (remarks of Senator Norris). See also Hearings on H. R. 2373 before a Subcommittee of the Senate Judiciary Committee, 67th Cong., 1st Sess. (1921).

[14] As such, the agency association's interests may in some situations be antithetical to those of the growers with which it has